

**In the United States Bankruptcy Court  
for the  
Southern District of Georgia  
Savannah Division**

In the matter of:

DOROTHY OLIVIA ISAAC

*Debtor*

JIM WALTER HOMES, INC./  
MID-STATE HOMES, INC.

*Movant*

v.

DOROTHY OLIVIA ISAAC  
SYLVIA FORD BROWN,  
Chapter 13 Trustee

*Respondent*

Chapter 13 Case

Number 99-40170

**FILED**

at 10 O'clock & 30 min. A.M.  
Date 12/20/00

MICHAEL F. McHUGH, CLERK  
United States Bankruptcy Court  
Savannah, Georgia *RHC*

**ORDER ON DEBTOR'S PLAN MODIFICATION  
AND MOTION FOR RELIEF FROM STAY**

Debtor filed her Chapter 13 case on January 20, 1999. At that time she revealed that her only sources of income consisted of Social Security, family contributions, and food stamps. Her schedules revealed an interest in property located in Garden City, Georgia, which she inherited from her deceased brother, encumbered by a debt to Jim Walter Homes, Inc./Mid-State Homes, Inc. ("Mid-State Homes"). Her Plan

was confirmed after Mid-State Homes filed a claim for a mortgage arrearage of \$4,236.84. Since the filing of her case she has made fewer than half of the mortgage payments that have come due and is currently in arrears in the amount of \$3,785.00 in post-petition mortgage payments. The Debtor's property is worth approximately \$33,000.00 and the outstanding debt of \$21,000.00 yields significant equity in the property which provides some cushion to the lender notwithstanding the absence of regular payments.

In response to a pending motion for relief from stay filed by Mid-State Homes, the Debtor proposes to add this post-petition arrearage of \$3,785.00 to the Chapter 13 Plan and to amortize it over the remaining life of the plan by increasing payments from the confirmed amount of \$105.00 per month to approximately \$205.00 per month. The Debtor's current budget shows total income of \$827.00, a regular monthly mortgage payment of \$266.00, and after deducting the proposed Chapter 13 payment, she would have a net of only \$356.00 to meet all of her remaining needs.

While the Debtor has been in poor health, having been injured and later suffering a heart attack shortly after the filing of her case, she believes that she can return to work as a part-time cook and earn additional monies. She also has a promise from an out-of-state relative to assist her in making the payments so that she will not lose the home. In testimony, the Debtor revealed that she had worked part-time and earned as much as \$125.00 per week as a cook at the time she filed her case, but that extra income was not

revealed in the schedules. Because of her illness she has not earned that income since February of 1999, but believes that when she returns to work that additional money will assist her in funding the plan.

Mid-State Homes objects to the inclusion of the post-petition arrearage and believes that the modified plan is not feasible. It contends that because she failed to reveal the total amount of her income, Debtor's case has not been prosecuted in good faith.

The Debtor cites the Eleventh Circuit case of In re Hoggle to support modification of her Chapter 13 plan to include the post-petition arrearage. In re Hoggle, 12 F.3d 1008 (11<sup>th</sup> Cir. 1994). In this case, the Eleventh Circuit upheld the district court's finding that a confirmed Chapter 13 plan can be modified to allow the Debtor to cure a post-confirmation default with reference to a secured claim on the Debtor's house. In re Hoggle, 12 F.3d at 1008. A post-confirmation modification, however, must "comply with the requirements outlined in §1329, including adherence to §1322(b)(5)" and "a judicial inquiry should be undertaken to determine whether a proposed modification to cure a default will comport with §1322(b)(5)'s requirements that such a cure be effected within a reasonable time and simultaneously maintain payments on the long term loan." Hoggle, 12 F.3d at 1012.<sup>1</sup>

---

<sup>1</sup> 11 U.S.C. §1329 states that modification of a plan after confirmation can occur:  
(a) At any time after confirmation of the plan but before the completion of payments under such plan, the plan may be modified, upon request of the debtor, the trustee, or the holder of an allowed unsecured claim, to

Therefore, in order to determine if a proposed modification meets the requirements set forth in Hogle, the following factors must be considered: 1) Is the proposed modification made in good faith? §1329 (b)(1); §1325 (a)(3); 2) If the plan is modified, will the debtor be able to make all payments under the plan? §1329(b)(1); §1325(a)(6); 3) Is the proposed cure made over a reasonable period of time while payments to the objecting creditor are kept current? §1329 (b)(1); §1322(b)(5); 5) Is the proposed extension of the plan justified? §1329(c). In re Binder, 224 B.R. 483, 488 (Bankr. D. Colo. 1998). This judicial inquiry should be considered simultaneously with the requirements of 362 (d)(1) which provides for relief from stay "for cause, including the lack of adequate protection of an interest in property of such party in interest" and 362(d)(2) which provides for relief from stay "with respect to any act against property. . . if (A) the debtor does not have an equity in such property and (B) such property is not necessary to an effective reorganization." 11 U.S.C. §362(d)(1); 11 U.S.C. §362(d)(2).

---

(1) increase or reduce the amount of payments on claims of a particular class provided for by the plan;

(2) extend or reduce the time for such payments; or

(3) alter the amount of the distribution to a creditor whose claim is provided for by the plan to the extent necessary to take account of any payment of such claim other than under the plan.

(b)(1) Sections 1322(a), 1322(b), and 1323(c) of this title and the requirements of section 1325(a) of this title apply to any modification under subsection (a) of this section.

1322(b)(5) states in relevant part:

notwithstanding paragraph (2) of this subsection, provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending on any unsecured claim or secured claim on which the last payment is due after the date on which the final payment under the plan is due;

The Creditor in this case argues that the Debtor's proposed modification fails to meet the requirements set forth in §1322(b)(5), namely that defaults be cured within a reasonable time and that payments are maintained while the case is pending and that relief from stay should be granted "for cause". The Creditor further argues that the Debtor, in failing to disclose certain income that she received "under the table" from cooking violates the good faith requirement found in §1325(a)(3).

Relief from stay cannot be granted in this case under 362 (d)(2). "If a debtor has equity in a property sufficient to shield the creditor from either the declining value of the collateral or an increase in the claim from accrual of interest or expenses, then the creditor is adequately protected." In re Matthews, 208 B.R. 506, 511 (Bankr. N.D. Ala. 1997)(quoting In re James River Assocs., 148 B.R. 790, 796 (E.D. Va. 1992)). In the present case, the Debtor's property value is \$33,840.00 with a balance of \$21,000.00, leaving an equity cushion which will provide adequate protection to the Creditor in this instance. See In re Matthews, 208 B.R. 506, 511 (Bankr. N.D. Ala. 1997).

The Creditor must therefore rely on the remaining arguments that "cause" exists to lift the stay under Section 362(d)(1), that the modification fails to meet Section 1322(b)(5)'s requirement that the cure be made within a reasonable time, or alternatively, that the Debtor's failure to disclose income fails to meet the good faith requirement set forth in §1325(a)(3). While the Debtor's proposed modification does increase payments

by almost one hundred dollars a month, she has testified that her income should increase due to familial support and that she can gain additional employment. This additional income should provide the Debtor with the means to fund the plan, with the included arrearage payments, within a reasonable time.

While Mid-State Homes argued that the plan as modified will not cure the arrearage within "a reasonable time," it offered no evidence to support this proposition. "Reasonable time under 1322(b)(5) is a flexible concept. Whether a proposal to cure an arrearage is reasonable must be determined in each individual Chapter 13 case coming before this court for confirmation after considering each debtor's circumstances, and the court, using its discretion, must determine whether the plan as proposed meets the requirements of confirmation, including the plan content requirements of 1322(b)(5)." Fleet Finance, Inc. v. Shirley Iris Randolph (*In re Randolph*), Ch. 13 Case No. 88-11396, slip op. at 3 (S.D. Ga. August 7, 1989)(Dalis, J.). I hold that due to the substantial equity in this case a longer cure period can be deemed reasonable than if there were no equity cushion and that a cure within the remaining duration of the plan is reasonable. See United States v. Easley, 216 B.R. 543 (D. Va. 1997)(holding that a reasonable time to cure an arrearage may not exceed the statutory limitation of five years in a reorganization plan).

The only remaining bar, therefore, to the Debtor's modification of her plan to include post-petition arrearage is her failure to include her part-time income on her

original schedules. A Chapter 13 plan cannot be confirmed unless the "plan has been proposed in good faith and not by any means forbidden by law." 11 U.S.C. §1325(a)(3). Good faith requires that the petition "be filed with the honest intent and genuine desire to utilize the provisions" of the Code and not as a "device to serve some sinister and unworthy purpose of the petitioner." In re Waldron, 785 F.2d 936, 939 (11<sup>th</sup> Cir. 1986). In the present instance, the debtor failed to disclose income of \$125.00 a week at the time of the filing of the petition in January of 1999. There was no evidence of how long she held that job. Moreover, the Debtor testified that she stopped receiving this income in February of 1999, meaning that the funds diverted from the Chapter 13 plan were negligible. Because the good faith inquiry is fact intensive, because there are no other facts which reveal any lack of good faith, and because failure to disclose this income was rendered moot by her illness which prevented receipt of this income for a lengthy period of time, I find that Debtor's failure to disclose this income should not bar modification of her Chapter 13 plan. See In re Hoggle, 12 F.3d 1008 (11<sup>th</sup> Cir. 1994)("Chapter 13's overall policy is to facilitate adjustments of the debts of individuals with regular income through flexible repayment plans funded through future income." *quoting* H.R.Rep. No. 95-595, 95<sup>th</sup> Cong., 1<sup>st</sup> Sess. 118(1977); S.Rep.No. 95-989, 95<sup>th</sup> Cong., 2d Sess. 141 (1978) U.S. Code Cong. & Admin.News 1978, p. 5787.).

However, due to the serious pre and post-petition arrearage Movant can no longer be denied regular, uninterrupted monthly payments. Accordingly, the plan is

confirmed, with strict compliance as to all future direct and plan payments commencing January 1, 2001. Should any future default in payment occur, the Trustee or Movant may file an affidavit of that fact and if uncontradicted by Debtor after fifteen (15) days, the Court will dismiss or convert this case to Chapter 7.



---

Lamar W. Davis, Jr.  
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 19<sup>th</sup> day of December, 2000.